85-579

Supreme Court, U.S.
FILED
OCT 3 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-_____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

WALTER WARREN,

*Petitioner,*

*v.*

LOCAL 1759, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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October 3, 1985

## QUESTION PRESENTED

Does a federal court have subject-matter jurisdiction to adjudicate a duty of fair representation lawsuit brought by a civilian federal employee against his union; or is the employee relegated to using only the processes of the Federal Labor Relations Authority to attempt to redress the union's violation of its duty of fair representation?

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No. 85-_____

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WALTER A. WARREN,

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v.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1759,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Walter A. Warren prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in the above-entitled case.

## REPORT OF THE OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 764 F.2d 1395 (11th Cir. 1985) and is reproduced as Appendix A to this petition. The unreported decision of the United States Dis-

trict Court for the Northern District of Georgia is reproduced as Appendix B to this petition.

## JURISDICTION

The decision of the court of appeals was entered on July 5, 1985. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). This petition is filed within ninety (90) days after the entry of the decision of the court of appeals, pursuant to 28 U.S.C. § 2101(c) and Rule 20.2, Rules of the United States Supreme Court.

## STATUTORY PROVISIONS INVOLVED

This case involves the general federal question jurisdiction statute, 28 U.S.C. § 1331, and Title VII of the Civil Service Reform Act (Federal Service Labor-Management and Employee Relations Statute), 5 U.S.C. § 7101 *et seq.* The relevant statutes are reprinted in Appendix C, *infra.*

## STATEMENT OF THE CASE

The issue in this case is whether a civilian federal employee may invoke the general federal question jurisdiction of a federal court to litigate a duty of fair representation claim against his exclusive bargaining representative.

Petitioner Walter Warren is a civilian employed by the United States Department of the Army at Fort McPherson, Georgia. Local 1759, American Federation of Government Employees, has been certified as the exclusive bargaining representative of a unit of civilian federal employees, including petitioner. Petitioner is not a

member of Local 1759 and has never paid dues to the union.

In April 1983 the Department of the Army suspended petitioner without pay for five days based upon allegations of misconduct. Petitioner disagreed with the discipline and invoked the contractual grievance procedures which had been negotiated by Local 1759 and his employer. After exhausting the initial grievance procedures, petitioner asked Local 1759 to take his grievance to arbitration, but the union refused.

On June 3, 1983, petitioner filed an unfair labor practice charge with the Federal Labor Relations Authority (FLRA) against the union. He charged, in essence, that the union had failed to take his grievance regarding the five-day suspension to arbitration solely because of his nonmembership in the union. The FLRA regional director refused to issue a complaint on this unfair labor practice charge. Petitioner then appealed to the FLRA General Counsel, who affirmed the regional director's decision.

In May 1983 the Department of the Army issued a second suspension against petitioner, this time withholding his pay for ten days. Petitioner again went through the grievance procedures and again asked Local 1759 to take his grievance to arbitration. Again, Local 1759 refused.

On August 31, 1983, petitioner filed a second FLRA unfair labor practice charge against Local 1759. This unfair labor practice charge alleged that the union was again discriminating against petitioner because of his nonmembership in the union. Additionally, petitioner

charged that the union was retaliating against him for having filed his prior unfair labor practice charge.

The FLRA regional director again refused to issue a complaint on this second unfair labor practice charge. Petitioner again appealed to the FLRA General Counsel, who again affirmed the decision of the regional director and denied the appeal.

On September 30, 1983, petitioner initiated this litigation by filing a *pro se* complaint in the United States District Court for the Northern District of Georgia. The complaint alleged that Local 1759 had breached its duty of fair representation by capriciously and hostilely refusing to take petitioner's grievances to arbitration, based upon his nonmembership in the union. Federal court jurisdiction was predicated upon 28 U.S.C. § 1331, the general federal question jurisdiction statute.

Local 1759 filed a motion to dismiss the complaint, primarily arguing that the district court lacked subject-matter jurisdiction over a federal employee's duty of fair representation lawsuit. The district court agreed and dismissed petitioner's complaint. Specifically, the district court held that it had no subject-matter jurisdiction because the Federal Labor Relations Authority had exclusive jurisdiction over complaints by civilian federal employees alleging breach of the duty of fair representation.

The U.S. Court of Appeals for the Eleventh Circuit affirmed the decision of the district court, holding that federal court jurisdiction to adjudicate petitioner's fair representation claim does not exist. This petition for a writ of certiorari followed.

## REASONS FOR GRANTING THE WRIT

### I. The Eleventh Circuit's Decision Is An Unwarranted Limitation On The General Federal Question Jurisdiction Of The Federal Courts To Decide Duty Of Fair Representation Claims, Where Congress Has In No Way Manifested An Intention To Limit That Jurisdiction

This case raises an important question never before addressed by this Court, to wit: whether a federal court has jurisdiction to adjudicate a duty of fair representation lawsuit brought by a civilian federal employee against his union; or whether the employee is relegated to using only the processes of the Federal Labor Relations Authority to redress his injury. In enacting Title VII of the Civil Service Reform Act, Congress did not expressly limit the federal courts' subject-matter jurisdiction over federal employees' fair representation lawsuits. In fact, Congress remained silent on this issue, so the judiciary has been left to glean congressional intent from the statutes.

In 1978, Title VII of the Civil Service Reform Act, Pub. L. 95-454, 92 Stat. 1192, known as the Federal Service Labor-Management and Employee Relations Statute (5 U.S.C. § 7101 *et seq.*) was enacted. The purpose of the Civil Service Reform Act was to create "a comprehensive revision of the laws governing the rights and obligations of civil servants." *Cornelius v. Nutt*, ____ U.S.____, 105 S. Ct. 2882 (1985).

In enacting Title VII of the Civil Service Reform Act, however, Congress did not write on a clean slate. Title VII is closely patterned after the administrative scheme enacted under the Labor Management Relations Act (LMRA), 29 U.S.C. § 141 *et seq.* For instance, Title VII establishes the Federal Labor Relations Authority, like the National Labor Relations Board, for the purpose of investigating unfair labor practices. Title VII also grants unions representing federal employees the power of "exclusive representation," much as unions representing private employees have under the LMRA.[1] Finally, Title VII makes it an unfair labor practice for a federal employee union to discriminate against a bargaining unit member.

Nothing in Title VII of the Civil Service Reform Act, however, expressly limits the *methods* through which an aggrieved federal employee may seek redress against a union which has breached its duty of fair representation. Nothing in the Act expressly states that the processes of the FLRA are the exclusive remedy for an employee who alleges that the union is discriminating against him. The court of appeals held, however, that Congress intended to preempt the federal courts from exercising their general federal question jurisdiction when it enacted Title VII of the Civil Service Reform Act. That holding is supported neither by the text of the Civil Service Reform Act nor by this Court's duty of fair representation precedents.

At the time that Congress enacted Title VII of the Civil Service Reform Act and patterned it after the LMRA, the judicially enforced duty of fair representa-

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[1] *Compare* 5 U.S.C. § 7111(a) *with* 29 U.S.C. § 159(a).

tion had been long established by this Court, under both the LMRA and the Railway Labor Act. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Steele v. Louisville and Nashville Railroad Co.*, 323 U.S. 192 (1944). More importantly, this Court had specifically held that federal courts have subject-matter jurisdiction over fair representation claims because they "arise under" federal law. *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944).[2] Congress clearly knew of these precedents but said nothing explicit in Title VII of the Civil Service Reform Act that would either limit the federal courts' jurisdiction over these claims or make the FLRA's unfair labor practice procedures an aggrieved employee's exclusive remedy.[3]

In *Vaca v. Sipes*, *supra*, this Court recognized that a congressional grant of exclusive representation authority to a union, like the one given to respondent herein, might be unconstitutional unless there were checks and restraints on the union's power. Thus, *Vaca v. Sipes*, *supra*, allowed federal courts to exercise "supervisory" jurisdiction over unions through employees' fair representation damage suits, even though similar complaints could also be brought to the NLRB.

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[2] The federal law under which fair representation claims "arise" is the statutory grant of exclusive representation powers to unions. *See Vaca v. Sipes, supra.*

[3] In its most recent decisions construing the analogous provisions of the LMRA, this Court appears to have approved of a "two-track" system whereby employees with a fair representation claim may choose between filing an administrative complaint with the NLRB or initiating federal court litigation. *U.P.S. v. Mitchell*, 451 U.S. 56, 67 n.3 (1981); *Del Costello v. IBT*, ___ U.S. ___, 103 S. Ct. 2281, 2293 (1983); *see also Miranda Fuel Co.*, 140 NLRB 181 (1962).

> Since [*Steele v. Louisville and Nashville Railroad Co.*] the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law. Were we to hold, as petitioners and the Government urge, that the courts are foreclosed . . . from this traditional supervisory jurisdiction, the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint, since the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint . . . . The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine.

*Vaca v. Sipes*, 386 U.S. at 182-83 (citations omitted).

This Court's reasoning in *Vaca v. Sipes*, *supra*, is equally applicable to fair representation claims pressed by federal employees. Indeed, petitioner twice took his fair representation claim to the FLRA, and was twice denied the adversarial hearing which he sought. His complaint remains unredressed. Nothing in Title VII of the Civil Service Reform Act indicates that Congress meant to sanction such a result.

The Eleventh Circuit's decision failed to properly consider the traditional role of the federal courts in duty of fair representation cases. Its analysis ignored this Court's decision in *Vaca v. Sipes*, *supra*, which established the important policy reasons for giving an aggrieved employee quick access to the federal courts to litigate a duty of fair representation claim. Congress could have overrid-

den these policy considerations and made the FLRA processes the exclusive remedy for aggrieved federal employees. However, there is no clear evidence in the Act to show that Congress intended to do that. Thus, the lower court's decision constitutes a misreading of congressional intent and is an unwarranted limitation of the general federal question jurisdiction of the courts.

## II. A Decision By This Court Is Necessary To Settle An Important Question Of Law Affecting Many Thousands Of Civilian Federal Employees, On Which Federal Courts Have Issued Conflicting Opinions

The few federal courts that have faced the instant jurisdictional issue have rendered conflicting opinions. In *Karahalios v. Defense Language Institute*, 534 F. Supp. 1202 (N.D. Cal. 1982) and *Karahalios v. Defense Language Institute*, 544 F. Supp. 77 (N.D. Cal. 1982), a federal district court held that it had subject-matter jurisdiction under 28 U.S.C. § 1331 to adjudicate a duty of fair representation claim brought by a civilian federal employee against his union. Following this Court's decisions in *Steele v. Louisville and Nashville Railroad Co.*, *supra*, and *Vaca v. Sipes*, *supra*, the *Karahalios* cases held that since a union's duty of fair representation "arises under" federal law, the courts have general federal question jurisdiction over these claims.

In rejecting petitioner's appeal, however, the Eleventh Circuit specifically rejected the decision of the U.S. District Court for the Northern District of California in

*Karahalios*. After noting that the *Karahalios* cases "supported [petitioner Warren's] position," the court of appeals held that the *Karahalios* decisions rested upon "faulty premises."[4]

The obvious conflict in the decisional law of the lower courts should be addressed by this Court. Many thousands of civilian federal employees are affected by the continuing uncertainty which these conflicting decisions have created. Furthermore, the FLRA administrative processes are also subject to confusion while this issue remains unresolved.[5]

## CONCLUSION

The decision of the court of appeals is an unwarranted limitation upon the general federal question jurisdiction of the federal courts. Congress did not intend to exclude federal employees from the judiciary's traditional supervisory jurisdiction over duty of fair representation litigation when it enacted Title VII of the Civil Service

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[4] At least one other federal district court, having addressed the identical issue, has held that federal courts have no subject-matter jurisdiction to adjudicate a federal employee's duty of fair representation complaint against his union. ***Butler v. AFGE***, Civil Action No. C81-482 (N.D. Ohio 1982) (unreported memorandum decision). Similarly, one other U.S. Court of Appeals has addressed this issue and apparently held that federal courts have no subject-matter jurisdiction in this type of case. *Wilson v. United States Bureau of Prisons*, Case No. 84-5735 (3d Cir. 1985) (unreported memorandum decision), *affirming* Case No. 83-0805 (M.D. Pa. 1984) (unreported memorandum order).

[5] Because of the important public policy questions underlining this case, and the impact which a decision will have upon all civilian federal employees and the FLRA, petitioner respectfully believes that it would be appropriate for this Court to request that the Solicitor General of the United States express the position of the United States with regard to the instant petition for certiorari.

Reform Act. Finally, the conflicting decisions issued by lower federal courts have created confusion among the bench and bar. This Court should settle the interesting and important jurisdictional issue presented by this case.

Respectfully submitted,

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# APPENDICES

# APPENDIX A

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**Decision of the**
**United States Court of Appeals**
**for the Eleventh Circuit**

**July 5, 1985**

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# UNITED STATES COURT OF APPEALS
# FOR THE ELEVENTH CIRCUIT

WALTER A. WARREN,
*Plaintiff-Appellant,*

v.

LOCAL 1759, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
*Defendant-Appellee.*

No. 84-8377
July 5, 1985

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Appeal from the United States District Court for the Northern District of Georgia.

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Before KRAVITCH and CLARK, Circuit Judges, and PECK*, Senior Circuit Judge.

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JOHN W. PECK, Senior Circuit Judge:

This case is before the court upon an appeal from the district court order granting the appellee's motion to dismiss for lack of subject matter jurisdiction. Appellant Walter Warren is a civilian employed by the Department of the Army at Fort McPherson, Georgia. Local 1759, American Federation of Government Employees, is the exclusive collective bargaining representative of a unit of civilian federal employees including Warren.

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* Honorable John W. Peck, U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

In April 1983, Warren was suspended without pay for five days based upon allegations of misconduct. He disagreed with the disciplinary action and invoked the contractual grievance procedures which had been negotiated by Local 1759 and his employer. After exhausting the initial grievance procedures, he asked Local 1759 to take his grievance to arbitration, but the union refused. Warren then filed an unfair labor practice charge with the Federal Labor Relations Authority ("FLRA") against the union. The FLRA Regional Director refused to issue a complaint, stating that the charge had been investigated and it did not appear that further proceedings were warranted. Appellant then appealed to the FLRA General Counsel, who affirmed the Regional Director's refusal to issue a complaint. In May 1983, Warren was again suspended; once more he went through the procedure outlined above. As before, the FLRA Regional Director refused to issue a complaint and the decision was affirmed by the FLRA General Counsel.

Warren then initiated this litigation by filing a complaint in the United States District Court for the Northern District of Georgia, alleging that Local 1759 had breached its duty of fair representation by capriciously and with hostility refusing to take his grievances to arbitration because he was not a member of Local 1759. Federal court jurisdiction was predicated upon 28 U.S.C. § 1331. The district court dismissed Warren's complaint, holding that the court lacked subject matter jurisdiction because the FLRA had exclusive jurisdiction over the controversy. For the reasons set forth below, we affirm.

The sole issue before this court is whether, under Title

VII of the Civil Service Reform Act (the Labor-Management and Employment Relation statute), 5 U.S.C. § 7101 *et seq.*, a federal employee can invoke the jurisdiction of the federal district courts to adjudicate a duty of fair representation action against the employee's exclusive bargaining representative. Title VII of the Civil Service Reform Act ("CSRA") explicitly governs labor-management relations in the federal sector. Section 7114(a)(1) imposes a duty of fair representation upon a labor organization which is the exclusive representative of the federal employees in its unit: "An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership." In the present case, Warren contends that Local 1759 breached its § 7114(a)(1) duty of fair representation by failing to proceed to arbitration. Section 7116 sets forth actions which constitute unfair labor practices for purposes of the CSRA. As the district court noted, the breach alleged by Warren would constitute an unfair labor practice under § 7116(b).[1]

In § 7105 of the CSRA, Congress gives the FLRA the powers and duties to take necessary and appropriate actions to effectively administer the provisions of the CSRA. Section 7105 confers upon the FLRA the authority to conduct hearings and resolve complaints of unfair labor practices. Section 7118 requires the General Coun-

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[1] 5 U.S.C. § 7116(b) provides in relevant part:

For the purpose of this chapter, it shall be an unfair labor practice for a labor organization—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

. . . .

(8) to otherwise fail or refuse to comply with any provision of this chapter.

sel of the FLRA to investigate charges of unfair labor practices and to either issue a complaint or provide the charging party with a written statement of the reasons for not issuing a complaint. The district court, quoting from *National Federation of Federal Employees, Local 1263 v. Commandant, Defense Language Institute*, 493 F.Supp. 675, 679 (N.D.Cal.1980) ("NFFE"), noted that under the CSRA Congress explicitly empowers the federal courts to act in three instances:

> First, it makes judicial review of final orders of the FLRA available only in the appropriate federal circuit court of appeals. 5 U.S.C. § 7123(a). Second, it provides that the FLRA may petition a circuit court of appeals for enforcement of its orders and for appropriate temporary relief of restraining order. 5 U.S.C. § 7123(b). Third, pursuant to § 7123(d), the FLRA, upon issuing an unfair labor practice complaint, may petition a federal district court for temporary injunctive relief. 5 U.S.C. § 7123(d).

The district court concluded that reading the CSRA as a whole shows that Congress intended for the statutory procedure to be deemed exclusive. Appellant, however, argues that federal courts have subject matter jurisdiction to hear duty of fair representation lawsuits brought by federal employees. Appellant states that prior to the enactment of the CSRA in 1978, under both the National Labor Relations Act ("NLRA") and the Railway Labor Act, employees have used the "general federal question jurisdiction" of 28 U.S.C. § 1331 to litigate duty of fair representation claims against their unions in federal courts. He contends that nothing in the CSRA, either explicitly or implicitly, evinces a Congressional intent to abrogate the federal employees' right to litigate

duty of fair representation claims in federal courts.

Thus, our analysis first focuses upon the question of Congressional intent. Because Congress patterned the FLRA on the National Labor Relations Board ("NLRB") in many respects,[2] a review of judicial precedents of private sector law which had arisen under the NLRA is in order.

In the instant case, the district court found significant the fact that although Congress patterned the FLRA in many respects after the NLRB, Congress did not enact a provision in the CSRA that parallels § 301[3] of the LMRA. Section 301 provides in pertinent part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties.
>
> . . .

Thus, § 301 confers jurisdiction of the district court over suits based upon collective bargaining agreements in the private sector. The district court stated:

> In that Congress did not enact in the FLRA a provision analogous to Section 301 of the LMRA and because Congress explicitly empowers the federal

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[2] *See Columbia Power Trades Council v. U.S. Department of Energy*, 671 F.2d 325 (9th Cir.1982); *National Federation of Federal Employees Local 1263 v. Commandant, Defense Language Institute*, 493 F.Supp. 675 (N.D.Cal.1980).

[3] Section 301, 29 U.S.C. § 185(a), was enacted in 1947 as part of the Labor Management Relations Act, 61 Stat. 156, which amended the NLRA.

> courts to act in three situations applicable to this case, the Court declines to carve out an exception to the preemption doctrine as urged by the plaintiff.

In *Yates v. United States Soldiers' and Airmens' Home*, 533 F.Supp. 461 (D.D.C.1982), the court analyzed the legislative history of the CSRA and discussed the significance of the absence of a § 301 analogue:

> The failure of Congress to provide a clear jurisdictional grant to district courts over disputes involving public sector labor agreements is particularly telling when compared with the approach taken by Congress in the private sector . . . .
>
> The Civil Service Reform Act of 1978 contains no provision analogous to § 301. Not only is the Act silent on the point, but the legislative record indicates that Congress did, in fact, consider and reject a proposed provision similar to § 301 when it enacted the Act. [NFFE, *supra.*], 493 F.Supp. 675, 681 n. 13 (N.D.Cal.1980).

533 F.Supp. at 464-5.

The court concluded "that the absence of a jurisdictional grant in the Act is a clear indication that Congress intended to bar actions to enforce collective bargaining agreements in the district courts." 533 F.Supp. at 463.

Similarly, in *Columbia Power Trades Council v. U.S. Department of Energy*, 671 F.2d 325 (9th Cir.1982), the court reached the same conclusion:

> The only provision made for judicial jurisdiction appears in 5 U.S.C. § 7123. An aggrieved party may appeal the Authority's action to a court of appeals,

> the Authority may petition a court of appeals for enforcement of its orders, and the Authority may seek an injunction in a district court after it has issued a complaint. At no point does the Act entitle a party to petition a district court for relief. Given the broad purpose of the Act to meet the special requirements of government, the leadership role of the Authority, and the limited role of the judiciary in this statutory scheme, it is manifestly the express desire of Congress to create an exclusive statutory scheme. (footnotes omitted)

533 F.Supp. at 463.

Appellant argues that Congress' failure to enact a § 301 analogue in the CSRA is irrelevant because the separate jurisdictional grant in § 301 has never served as the jurisdictional basis of a duty of fair representation claim. He cites the seminal case of *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967), in which an employee with medical problems was discharged from a job requiring heavy work. The union took the grievance through the initial steps of the grievance procedure, but refused to proceed to arbitration. The employee then brought an action against union officials in state court. Before the Supreme Court, defendants made the argument, *inter alia*, that the state court lacked subject matter jurisdiction because the union's conduct was an unfair labor practice, and thus the action was within the exclusive jurisdiction of the NLRB. The Court held that the state court had jurisdiction over the action, citing "the unique role played by the duty of fair representation doctrine in the scheme of federal labor laws, and its important relationship to the judicial enforcement of collective bargaining agreements in the context presented

here." 386 U.S. at 188, 87 S.Ct. at 916. Appellant maintains that under *Vaca*, the Supreme Court implicitly approved of a dual system in which employees can file unfair labor practice charges against the union with the NLRB, or they can sue for damages in federal court, independent of the NLRB's procedures. Appellant contends that Congress was aware of this dual system when it enacted the CSRA in 1978, and did not expressly reject it.

Appellant states that at the time Congress enacted the CSRA, federal courts had held that subject matter jurisdiction over private sector duty of fair representation claims is properly predicated upon 28 U.S.C. § 1337.[4] *Smith v. Local 25, Sheet Metal Workers*, 500 F.2d 741, 748 (5th Cir.1974); *Mumford v. Glover*, 503 F.2d 878, 882-83 (5th Cir.1974). Both *Smith* and *Mumford*, however, are distinguishable from the present case. *Mumford* involved a claim that the union had breached its duty in the administration of a pension plan; there was no underlying employer action in violation of a collective bargaining agreement. Similarly, *Smith* did not involve an allegation of an underlying violation of a collective bargaining agreement. In both *Mumford* and *Smith*, the court found jurisdiction under 28 U.S.C. § 1337 because the NLRA and the Railway Labor Act, respectively, were laws regulating commerce. Because no violation of

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[4] 28 U.S.C. § 1337 states:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

Because Appellant alleges jurisdiction under 28 U.S.C. § 1331, we do not reach the issue of whether the CSRA is an act regulating commerce within the meaning of § 1337.

a collective bargaining agreement was involved, there could be no § 301 jurisdiction. The court in *In re Carter*, 618 F.2d 1093, 1104 (5th Cir.1980), summarizes this point succinctly:

> When the allegations assert a breach of the duty of fair representation without a corresponding breach of the collective contract, federal question jurisdiction cannot be grounded on Section 301.

Regardless of Appellant's failure to name the employer as a party to this action, there is an underlying allegation that the breach of the duty of fair representation involved a breach of the collective bargaining agreement by the employer. Appellant's complaint stated: "Local 1759 has entered into a collective bargaining agreement with plaintiff's employer as a result of its exclusive representation of the bargaining unit" and "Local 1759 owes plaintiff a statutory duty to fairly represent plaintiff in all aspects of its administration of the collective bargaining agreement, pursuant to § 7114(a)(1)." If Appellant's action had been in the private sector, § 301 would have been the jurisdictional basis because the action involved both the duty of fair representation and breach of collective bargaining agreement claims. *Carter, supra; see also Seymour v. Olin Corp.*, 666 F.2d 202 (5th Cir.1982). Because Congress considered and rejected a § 301 parallel in the CSRA, we conclude that Congress did not intend for federal courts to have jurisdiction over such duty of fair representation claims by federal employees.

The cases of *Karahalios v. Defense Language Institute*, 534 F.Supp. 1202 (N.D.Cal.1982) and *Karahalios v. Defense Language Institute*, 544 F.Supp. 77 (N.D.Cal. 1982) (*Karahalios II*) support Appellant's position. In

those cases, the plaintiff, a federal employee, brought action against the federal employer and the union, alleging unfair representation, breach of the collective bargaining agreement, and due process and equal protection violations. The district court held that it had subject matter jurisdiction of the employee's claim against the union for breach of the duty of fair representation under 28 U.S.C. § 1331. *Karahalios* at 1206-7; *Karahalios II* at 79.

Appellee argues that the court in the Karahalios cases relied on two faulty premises: first, the alleged lack of an explicit duty of fair representation provision in the CSRA and second, the inability of the FLRA to provide individual relief to employees aggrieved by a breach of the duty of fair representation. Appellee is correct in its assertion that the court in *Karahalios* erroneously assertion that the court in *Karahalios* erroneously stated that there is not an explicit duty of fair representation provision in the CSRA; actually, the CSRA provides for an explicit duty of fair representation by a union to federal employees which it exclusively represents in § 7114(a).[5] In contrast, neither the NLRA nor the Railway Labor Act explicitly impose a duty of fair representation; an implied duty, however has been established through court and NLRB decisions. *See Vaca, supra; Steele v.*

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[5] Appellant maintains that unions have both an implied and an express duty of fair representation under the CSRA. He contends that the judicially enforceable duty of fair representation arises out of 5 U.S.C. § 7111 (Congress' grant of exclusive representation) and *not* out of the explicit provision of 5 U.S.C. § 7114(a)(1). We do not agree with Appellant's contention that the duties enumerated in § 7114(a)(1) are "irrelevant" here. Rather, we agree with Appellee that the failure of the court in *Karahalios* to recognize the explicit duty of fair representation undermines the validity of the conclusion reached in that decision.

*Louisville and Nashville Railroad*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944); *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187 (1944); *Miranda Fuel Co.*, 140 NLRB 181, 51 LRRM 1584 (1962). Appellee also correctly asserts that the concern expressed by the court in *Karahalios* that the FLRA would be unable to provide relief to federal employees aggrieved by a breach of the duty of fair representation is unwarranted. Section 7118(a)(7) provides that upon finding an unfair labor practice, the FLRA shall issue an order requiring reinstatement of back pay or such other relief as will effectuate the purpose of the statute.[6]

Based upon the foregoing analysis, we hold that Congress conferred exclusive jurisdiction over a federal employee's duty of fair representation claim in the FLRA. Accordingly, the decision of the district dismissing Appellant's complaint is AFFIRMED.

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[6] Appellant cites *Broida, Fair Representation for Federal Employees: An Overview*, Federal Bar News and Journal, Vol. 30/No. 11, page 440, 442 (Nov.1983), in which it is stated that the FLRA enforces duty of fair representation claims "less vigorously than its private sector counterpart." In view of the numerous FLRA cases, cited in Appellee's brief, in which relief was granted against the union for breach of the duty of fair representation, we are unpersuaded by Appellant's argument that the FLRA lacks zeal in prosecution of duty of fair representation claims.

# APPENDIX B

## Order of the United States District Court for the Northern District of Georgia

## March 26, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

| | |
|---|---|
| WALTER A. WARREN | |
| v. | C83-2118A |
| LOCAL 1759, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES | Filed: March 26, 1984 |

**ORDER**

The plaintiff, Walter A. Warren, in the above-styled civil action filed a complaint against the American Federation of Government Employees ["AFGE"] Local 1759 for an alleged failure to fairly represent him by refusing to proceed to arbitration with respect to two separate suspensions imposed upon him by his employer, the United States Department of the Army. Defendant AFGE, in response, filed the pending motion to dismiss which is now ripe for ruling. The determinative issue before the Court is whether under the Federal Labor-Management Relations statute, Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. § 7101 *et seq.* ["FLRS"], a private party, namely a federal employee, can invoke the limited jurisdiction of a federal district court to determine if the exclusive union representative breached its duty of fair representation in its handling of the employee's grievance. Upon consideration of the briefs, the FLRS and the applicable case law, the Court concludes that it lacks

subject matter jurisdiction over this action because the Federal Labor Relations Authority has exclusive jurisdiction over the instant controversy. As a result, the defendant's motion to dismiss is granted.

The Fair [*sic*] Labor-Management Relations statute explicitly governs labor management relations in the federal sector. Section 7114(a)(1) provides that a labor organization that is the exclusive representative of the federal employees in its unit is responsible for representing the interests of those employees without discrimination and without regard to labor organization membership. The plaintiff contends that the defendant breached its section 7114(a)(1) duty by failing to proceed to arbitration with respect to his suspensions allegedly because the plaintiff was not a member of the union. Complaint ¶¶ 4-12. However, these allegations are, in effect, charges of unfair labor practice under 5 U.S.C. § 7116(b), which provides in pertinent part:

> For the purposes of this chapter, it shall be an unfair labor practice for a labor organization—
>
> . . .
>
> (5) to refuse to consult or negotiate in good faith with an agency as required by this chapter,
>
> . . .
>
> (8) to otherwise fail or refuse to comply with any provision of this chapter.

Under 5 U.S.C. § 7105, Congress gives the Federal Labor Relations Authority ["FLRA"] jurisdiction over actions by private parties seeking relief from unfair labor practices:

> (2) The authority shall to the extent provided in this chapter and in accordance with regulations prescribed by the [FLRA]—
>
> . . .
>
> (G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title.

Title 5 U.S.C. § 7118(a)(1) provides as follows:

> If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

In addition to the range of functions which Congress has entrusted to the FLRA, the structure of the statutory scheme itself indicates that Congress intended no independent federal court jurisdiction over such matters. As explained in *National Federation of Federal Employees, Local 1263 v. Commandant, Defense Language Institute*, 493 F. Supp. 675, 679 (N.D. Cal. 1980), under the FLRA Congress explicitly empowers the federal courts to act in three instances:

> *First*, it makes judicial review of final orders of FLRA available only in the appropriate federal circuit courts of appeals. 5 U.S.C. § 7123(a). *Second*, it provides that the FLRA may petition a circuit

> court of appeals for enforcement of its orders and for appropriate temporary relief or restraining order. 5 U.S.C. § 7123(b). *Third*, pursuant to § 7123(d), the FLRA, upon issuing an unfair labor practice complaint, may petition a federal district court for temporary injunctive relief.

(emphasis added). The statutory scheme further indicates that Congress has provided an explicit, but circumscribed, role for the federal courts as outlined in 5 U.S.C. § 7123. Reading the FLRA as a whole shows that Congress intended that the statutory procedure be deemed exclusive. *Id. See also Columbia Power Trades Council v. U.S. Department of Energy*, 671 F.2d 325 (9th Cir. 1982).

In the case at bar, the plaintiff filed, on June 3, 1983, an unfair labor practice charge with the FLRA against AFGE alleging violations of 5 U.S.C. § 7116(b)(1) concerning the five-day suspension in that:

> On June 2, 1983, William Wood, on behalf of AFGE Local 1759, refused to proceed to arbitrate on my grievance because: (1) I am not a union member, (2) I could not give them a $1,000.00 cashier's check toward arbitration costs.

By letter dated August 4, 1983, the FLRA Regional Director indicated that the unfair labor practice charge had been investigated and considered and that it did not appear that further proceedings were warranted. The Regional Director's decision was appealed to the General Counsel. On August 31, 1983, the plaintiff filed a second unfair labor practice charge against AFGE. This charge again alleged violation of 5 U.S.C. § 7116(b)(1) on basically the same grounds as set forth in the first charge,

this time regarding a 10-day suspension action. During the pendency of an investigation of the second charge, the plaintiff instituted this lawsuit. On October 31, 1983, the Regional Director again issued a letter declining to issue a complaint explaining that there is no evidence, after an investigation, that the union action was discriminatory, arbitrary, in bad faith or based on any unlawful considerations. In that letter, the plaintiff was informed of his right to appeal the decision to the FLRA General Counsel by no later than November 30, 1983.

In response to the motion to dismiss, the plaintiff urges this Court to create an exception to the exclusive jurisdiction of the FLRA to permit him to sue the AFGE for breach of the duty of fair representation. The plaintiff points out that the Supreme Court in *Vaca v. Sipes*, 386 U.S. 171 (1967), recognized an exception to the preemption doctrine in the private sector under Labor Management Relations Act ["LMRA"], 29 U.S.C. § 151 *et seq.* The Supreme Court in *Vaca* based the exception on the fact that Congress expressly provided private suits for breach of the collective bargaining agreement in section 301 of the LMRA, 29 U.S.C. § 185. Congress patterned the FLRA in many respects after the NLRA. *New Jersey Air National Guard v. Federal Labor Relations Authority*, 677 F.2d 276 (3d Cir. 1982), *cert. denied*, 103 S.Ct. 343 (1982); *Columbia Power Trade v. U.S. Department of Energy, supra*, 671 F.2d at 326-627 [*sic*]. For example, the role of General Counsel of the FLRA is analogous to the role of the General Counsel of the NLRB, and the decision of the General Counsel under each statute whether or not to issue a complaint is unreviewable. *Turgeon v. Federal Labor Relations Authority*, 677 F.2d 937, 939 (D.C. 1982).

Congress, however, did not enact a provision in the FLRA that is analogous to section 301 of the NLRA. Rather, Congress vested the FLRA with jurisdiction over such disputes. 5 U.S.C. §§ 7118, 7119(b)(2)(C)(1), 7121(b)(3)(C), 7122(a). Section 301 of the NLRA confers jurisdiction of the district court over suits based upon collective bargaining agreements. However, section 301 of the NLRA does not confer jurisdiction in this case because section 301 is inapplicable when the federal government is sued. 29 U.S.C. § 152. In that Congress did not enact in the FLRA a provision analogous to section 301 of the LMRA and because Congress explicitly empowers the federal courts to act in three situations not applicable to this case, the Court declines to carve out an exception to the preemption doctrine as urged by the plaintiff. *See National Federation of Federal Employees, Local 1263 v. Commandant, Defense Language Institute, supra*, 493 F. Supp. at 681 n.13.

In conclusion, the Court GRANTS the defendant's motion to dismiss for lack of subject matter jurisdiction because Congress conferred exclusive jurisdiction over the instant complaint in the FLRA.

SO ORDERED, this 23 day of March, 1984.

/s/ Charles A. Moye, Jr.

UNITED STATES DISTRICT JUDGE

# APPENDIX C

---

**Pertinent Statutory Provisions of Title VII of the Civil Service Reform Act (Federal Service Labor-Management and Employee Relations Statute) and 28 U.S.C. § 1331, the general federal question jurisdiction statute**

---

**28 U.S.C. § 1331. Federal question**

The district courts shall have original jurisdiction of all civil actions arising under the constitution, laws, or treaties of the United States.

**5 U.S.C. § 7101. Findings and purpose**

(a) The Congress finds that—

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

(A) safeguards the public interest,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

(b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal

Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.

**5 U.S.C. § 7102. Employees' rights**

Each employee shall have the right to form, join or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

**5 U.S.C. § 7111. Exclusive recognition of labor organizations**

(a) An agency shall accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election.

**5 U.S.C. § 7114. Representation rights and duties**

(a)(1) A labor organization which has been ac-

corded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

**5 U.S.C. § 7116. Unfair labor practices**

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter . . . .

(2)

No. 85-579

Supreme Court, U.S.
FILED
NOV 1 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

---

WALTER WARREN,

*Petitioner,*

*v.*

LOCAL 1759, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,

*Respondent.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

---

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

---

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23 pp

## QUESTION PRESENTED

Whether a federal employee can invoke the jurisdiction of the Federal courts to adjudicate a duty of fair representation action against the employee's exclusive bargaining representative.

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No. 85-579

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

---

WALTER WARREN,

*Petitioner,*

*v.*

LOCAL 1759, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,

*Respondet.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

---

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

---

## STATEMENT OF THE CASE

Respondent AFGE Local 1759 supplements the Petitioner's Statement of the Case as follows to the extent necessary to correct inaccuracies or omissions in that statement.

AFGE Local 1759 declined to take Mr. Warren's first five day suspension to arbitration after a thorough consideration of the matter. The FLRA Regional Director refused to issue an unfair labor practice complaint after conducting an investigation of this matter, including procuring sworn statements from all individuals with relevant information about the charge. By letter dated August 4, 1983 the Regional Director found that the evidence clearly shows that "the Union's Executive Board met on June 6, 1983, discussed your

[Mr. Warren's] grievance and voted unanimously not to invoke arbitration on the basis that the grievance lacked merit. Thereafter, on or about June 12, 1983, Wood [Local 1759 President at that time] informed you of the Executive Board's decision." The Regional Director concluded that the charged party's refusal to proceed to arbitration was not based on a lack of membership status, and there was no evidence that the Union's actions were discriminatory, arbitrary, in bad faith or based on any unlawful considerations. Mr. Warren filed an appeal of that refusal to issue an unfair labor practice complaint to the FLRA General Counsel, who acknowledged receipt of this appeal by letter dated October 28, 1983, and noted an absence of the required notice to the charged party, Local 1759.

What Petitioner's recitation of the Statement of the Case fails to elucidate is that Mr. Warren's institution of a lawsuit in the U.S. District Court on September 30, 1983 occurred during the pendency of the appeal of the first unfair labor practice charge to the FLRA General Counsel and during the pendency of the investigation of the second unfair labor practice charge by the Regional Director.

By letter dated January 26, 1984 the General Counsel of the FLRA denied Mr Warren's appeal on the first unfair labor practice charge. The General Counsel indicated, *inter alia*, that:

> the evidence shows that the Charged Party's President, who met with you several times and discussed your grievance in some detail, thoroughly explained it to the members of the executive committee. Moreover, it was concluded, in agreement with the Regional Director, that the evidence adduced by the investigation fails to show that the Charged Party chose not to proceed to arbitration with your grievance because you are not a member of Local 1759 or because of any other unlawful consideration.

With respect to the second unfair labor practice charge by Mr. Warren regarding Local 1759's refusal to take a second 10 day suspension for further alleged misconduct to arbitration, the Regional Director again, after a thorough investigation of the matter, refused to issue a complaint. By letter dated October 31 ,1983, the Regional Director again found no evidence that the refusal to proceed to arbitration with Mr. Warren's grievance was because of lack of membership status, or the filing of the previous unfair labor practice charge. Similarly, the General Counsel of the FLRA, by letter dated January 30, 1984 confirmed the Regional Director's finding of no evidence of any arbitrary, discriminatory or bad faith conduct in refusing to take the 10 day grievance to arbitration. Mr. Warren's charges were thus fully considered by the FLRA in both instances.

The decisions of the U.S. District Court for the Northern District of Georgia and the Eleventh Circuit Court of Appeals are set forth in the Appendix attached to Mr. Warren's Petition for a Writ of Certiorari.

## SUMMARY OF ARGUMENT

The statutory scheme of Title VII of the Civil Service Reform Act (CSRA) provides for employee redress of a breach of the duty of fair representation by his/her exclusive representative in the nature of back pay and other appropriate relief, by virtue of the unfair labor practice mechanism. 5 U.S.C. Section 7101. *et seq.* That statute sets forth in explicit terms the duty of fair representation owed by labor organizations to bargaining unit members, 5 U.S.C. Section 7114(a) (1), and the procedures for Federal Labor Relations Authority (FLRA) investigation, prosecution, and mandatory relief where unfair labor practices are alleged and demonstrated, 5 U.S.C. Sections 7105, 7116, 7118. The unambiguous language of Title VII of the CSRA provides for

federal jurisdiction in only three circumstances, permiting an individual employee, union or employer to seek judicial relief only to the federal circuit courts of appeals on prescribed final orders of the FLRA.

The case precedent, in virtual uniformity, has determined that Congress has vested the FLRA with exclusive jurisdiction in administering the federal labor management relations program, and that it is manifestly the expressed desire of Congress to create an exclusive statutory scheme, depriving the district courts of jurisdiction. On the exact issue of duty of fair representation suits brought by Federal employees, every court considering the matter, with the sole exception of a District Court in California, has specifically found that it lacked subject matter jurisdiction. As recognized by the Circuit Court below, that California district court's finding of general federal question jurisdiction was based on two faulty premises: the assumed lack of an explicit duty of fair representation provision in the CSRA (as in the case of its National Labor Relations Act [hereinafter NLRA] counterpart) and the perceived inability of the FLRA to provide individual relief to an employee aggrieved by a breach of the duty of fair representation.

Furthermore, Petitioner fails to recognize the hybrid nature of a duty of fair representation/breach of contract action. Mr. Warren's complaint in the District Court alleged a breach of the union's duty of fair representation in its administration of the collective bargaining agreement, which grievance and arbitration procedure is the sole avenue for challenging the underlying employer imposition of suspensions. Duty of fair representation decisions concerning similar issues in the private sector, i.e. refusal to proceed to arbitration for allegedly improper reasons, have relied on Section 301 of the LMRA, 29 U.S.C. Section 185, as the jurisdictional predicate, recognizing also that Section 301 represents a Congressionally created exception to the preemption doctrine. However,

Section 301 does not confer juristiction in this case because Section 301 is inapplicable when the federal government is sued. Congress did not enact in the FLRA a provision analgous to Section 301 of the LMRA, and indeed deleted a provision that would have provided a private cause of action. Congress recognized the special requirements and needs of the federal government, and entrusted broad powers to the FLRA to remedy breaches of the duty of fair representation.

Moreover, this case is not an appropriate one for the court's exercise of its discretionary writ of certiorari. There is unanimity among the two federal circuits and various other courts which have considered this identical issue, and the one lone dissenting opinion by the aforementioned District Court in California. The absence of a conflict between the federal circuits or any constitutional disputes, warrants the denial of the petition for certiorari.

## ARGUMENT FOR DENYING THE PETITION FOR CERTIORARI

### I. The Civil Service Reform Act Scheme, Legislative History and Major Distinctions with Private Sector Law Demonstrate Clearly that Congress Intended No Independent Federal Court Jurisdiction Over Duty of Fair Representation Actions by Federal Employees Against Their Exclusive Representatives.

Petitioner, as the Circuit Court below analyzed, refuses to recognize or acknowledge the significant differences in the substance and legislative history of the Civil Service Reform Act (CSRA) and its private sector counterpart. Indeed, Petitioner has continually failed to address the genesis of the duty of fair representation suit in the private sector as compared to its treatment in the federal statute. The simplistic, though oft-repeated statement in Mr. Warren's Petition, that

Congress did not expressly limit the federal courts' subject matter jurisdiction over federal employees' fair representation law suits ignores the statutory framework, legislative history and case law developed under the CSRA.

In Title VII of the CSRA, 5 U.S.C. § 7101 *et seq*, Congress gave the Federal Labor Relations Authority (FLRA) the power and duties to take necessary and appropriate actions to effectively administer the provisions of the CSRA. As the Circuit Court below recognized, Congress explicitly empowered the federal courts to act in only three instances. First, it makes judicial review of final orders of the FLRA available only in the appropriate federal circuit court of appeals. 5 U.S.C. § 7123(a). Second, it provides that the FLRA may petition a circuit court of appeals for enforcement of its orders and for appropriate temporary relief or restraining order. 5 U.S.C. § 7123(b). Third, pursuant to 5 U.S.C. § 7123(d), the FLRA, upon issuing an unfair labor practice complaint, may petition a federal district court for temporary injunctive relief. As the courts below recognized, reading the CSRA as a whole, demonstrates that Congress intended for the statutory procedure before the FLRA to be deemed exclusive.

The exclusivity of the statutory administrative labor management scheme in the federal sector has been consistently and uniformly recognized by the courts to foreclose federal court jurisdiction. *NFFE, Local 1263* v. *Commandant, Defense Language Institute*, 493 F.Supp. 675 (N.D. Cal. 1980); *Carter* v. *Kurzejeski*, 706 F.2d 835 (8th Cir. 1983); *Martel* v. *Carroll*, 562 F.Supp. 443 (D. Mass, 1983). In *Clark* v. *Mark*, No. 79-CV—777, slip op. (N.D.N.Y., 1980) the court stated that the "FLRS' (Federal labor relations statute) legislative history demonstrates, that the FLRA was intended by Congress to possess and exercise exclusive jurisdiction over cases involving complaints which allege violations of the FLRS." In *Columbia Power Trades Council* v. *U.S. Dept. of Energy*, 671

F.2d 325 (9th Cir. 1982) the court held that it had no jurisdiction over a suit by a federal employee's union seeking mandamus of an agency administator to implement an arbitrator's award. Finding the FLRA was vested with exclusive jurisdiction, the Court stated that "at no point does the Act entitle a party to petition a district court for relief." 671 F.2d 327. *Accord: Yates* v. *U.S. Soldiers' and Airmens' Home*, 553 F. Supp. 461, (D.D.C. 1982)

Most significantly, the Petitioner chooses to completely ignore the core of the opinion of the District and Circuit Courts below, that despite Congress' patterning the FLRA in many respects after the National Labor Relations Board (NLRB), Congress did not enact a provision in the CSRA that parallels Section 301 of the Labor Managment Relations Act (LMRA) (29 U.S.C. 185 (a)). Section 301 of the LMRA provides in pertinent part:

> Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce...or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties.

Thus as the Circuit Court noted, Section 301 confers jurisdiction of the district court over suits based upon collective bargaining agreements in the private sector. The exception to the preemption doctrine created in *Vaca* v. *Sipes*, 386 U.S. 171 (1967) for duty of fair representation suits in the private sector was based on the fact that Congress expressly provided suits for breach of the collective bargaining agreement in Section 301 of the LMRA. *Accord: Amalgamated Association of Street Electrical, Railway and Motor Coach Employees of America* v. *Lockridge*, 403 U.S. 274 (1971); *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S.1 (1983).

As the Circuit Court below further recognized, there is an underlying allegation by Mr. Warren that the breach of the duty of fair representation involved a breach of the collective bargaining agreement by the Employer in imposing the suspensions. In addition, as the Court sets forth (Appendix 9a), Mr. Warren in his complaint stated that "Local 1759 has entered into a collective bargaining agreement with the plaintiff's employer as a result of its exclusive representation of the bargaining unit" and "Local 1759 owes plaintiff a statutory duty to fairly represent plaintiff in all aspects of the administration of the collective bargaining agreement, pursuant to Sec. 7114(a) (1)." The Circuit Court notes correctly that "if appellant's [Mr. Warren's] action had been in the private sector, Sec. 301 would have been the jurisdictional basis because the action involved both the duty of fair representation and breach of collective bargaining agreement claims." As the Fifth Circuit set forth in *In re Carter*, 618 F.2d 1093, 1103 (5th Cir. 1980) "[i]t is only when the allegations in the complaint assert a breach of the duty of fair representation without a corresponding breach of the collective contract, that Federal question jurisdiction is not grounded on Section 301."1/

Section 301 of the LMRA governing private sector labor relations is clearly inapplicable to suits involving the federal sector. 29 U.S.C. § 152.

The CSRA, governing federal sector labor relations, contains no provisions analogous to Section 301 of the LMRA. Not only is there no provision in the CSRA

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1/ It is only then that the courts in private sector cases have turned to 28 U.S.C. 1337 regarding actions arising under an Act of Congress regulating commerce. The Petitioner has never asserted jurisdiction under 28 U.S.C. 1337 as it is patent that the CSRA is not an act affecting interstate commerce.

analogous to Section 301, but Congress in enacting the CSRA did in fact consider and reject a proposed provision similar to section 301. As the Circuit Court below set forth, the court in *Yates* v. *U.S. Soldiers' and Airmens' Home, supra*, analyzed the legislative history of the CSRA and discussed the significance of no Section analogue:

> The failure of Congress to provide a clear jurisdictional grant to district courts over disputes involving public sector labor agreements is particularly telling when compared with the approach taken by Congress in the private sector...The Civil Service Reform Act contains no provision analogous to § 301. Not only is the Act silent on the point, but the legislative record indicates that Congress did in fact, consider and reject a proposed provision similar to § 301 when it enacted the Act.

Similarly in *NFFE* v. *Commandant, supra,* 493 F. Supp. at 681, n. 13, this very analysis of the non-existence of a Section 301 parallel was thoroughly considered, with the court finding no legislative or judicial exception to the preemption doctrine. In *Columbia Power Trades Council* v. *U.S. Dept. of Energy, supra*, the court reached the same conclusion and added "[g]iven the abroad purpose of the Act to meet the special requirements of government, the leadership role of the Authority [FLRA], and the limited role of the judiciary in the statutory scheme, it is manifestly the express desire of Congress to create an exclusive statutory scheme."

Moreover the Petitioner ignores the genesis of the duty of fair representation claims in the private sector and the significance of an explicit duty of fair representation provision in the CSRA, not found in its private sector counterpart.

Although the NLRA does not explicitly impose a duty of fair representation, court decisions have established that under that Act, as under the Railway Labor Act, a union has a

duty to represent fairly the employees for whom it acts as exclusive bargaining agent. *Steele* v. *Louisville and Nashville RR,* 323 U.S. 192 (1944); *Ford Motor Co* v. *Huffman,* 345 U.S. 330 (1953). The NLRB however did not recognize that a breach of the duty of fair representation amounted to an unfair labor practice until its decision in *Miranda Fuel Co.,* 140 NLRB 181, 51 LRRM 1584 (1962) enf. denied, 326 F.2d 172 (2nd Cir. 1963). However, in *Vaca* v. *Sipes supra,* this Court implied, but declined to state specifically, that a breach of a union's duty of fair representation constitutes an unfair labor practice under Section 8(b) of the NLRA. In considering the preemption issue and rejecting it, the Court declared it could not assume from the NLRB's "tardy assumption of jurisdiction" in duty of fair representation cases that Congress "intended to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative." This Court referenced the fact that the NLRB waited until 1962 before deciding that such a breach of duty constituted an unfair labor practice, *Miranda Fuel, supra* 2/.

Thus the concept of a judicial cause of action for breach of the duty of fair representation arose in the private sector prior to any recognition by the NLRB of unfair labor practice jurisdiction over a breach of a duty of fair representation it later construed as implied in the statute. The history of the CSRA is profoundly different. The CSRA provides for an explicit duty of fair representation by unions to employees

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2/ Indeed, the Supreme Court has never specifically affirmed the NLRB's *Miranda Fuel* rule again stating in *DelCostello* v. *International Brotherhood of Teamsters, supra* "We have twice declined to decide the correctness of the Board's [Miranda Fuel] position, and we need not address that question today." Notwithstanding, this implicit duty in the private sector was not specifically recognized by the NLRB until after its inception in the courts.

over which it has exclusive jurisdiction by the language in 5 U.S.C. 7114(a)(1). This section provides:

> An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

Therefore, apart from the special needs and requirements of federal labor management relations, 5 U.S.C. § 7101; the clearly circumscribed nature of appellate review, *Columbia Power Trades Council* v. *Dept. of Energy supra*; and the absence of an LMRA Section 301 analogue in the CSRA; there is a compelling difference in the statutes governing the union's obligation to employees it represents in the federal and private sector. By statute, there is an unequivocal duty of fair representation owed by federal employee unions to employees over which they have exclusive jurisdiction, and any finding of breach of that duty is within the exclusive purview and remedial powers of the FLRA. Apart from similar unfair labor practices enunciated in the NLRA, the CSRA contains an additional catch-all unfair labor provision at 5 U.S.C. § 7116(b) (8) to "otherwise fail or refuse to comply with any provision of this chapter," specifically here the express duty of fair representation. Furthermore, 5 U.S.C. 7118(a) (7) affords total redress to an individual employee affected by a breach of duty of fair representation as it provides that upon finding an unfair labor practice the FLRA shall issue an order requiring reinstatement, back pay or such other relief as will carry out the purpose of the statute. As the court below recognized, the FLRA has not hesitated to exercise its untrammeled jurisdiction, and invoke its full remedial powers, where appropriate. Therefore, the courts which currently have chartered the parameters of their jurisdiction in these federal sector duty of fair representation matters, have recognized that they need not be burdened with their predecessor court's

concerns, in devloping a judicial cause of action in the private sector for breach of this duty in the 1940's and 1950's, that employee actions may not be redressible. Moreover, as provided *infra,* Congress explicitly rejected a private cause of action in the federal sector.

Additionally, the purpose behind the preemption doctrine is particularly significant in the context of a duty of fair representation charge under the federal labor management statute. There is a clear decision by Congress to vest in one administrative agency nationwide jurisdiction to adjudicate controversies within the Act's purview. *Local 926, Int'l Union of Operating Engineers* v. *Jones* 460 U.S. 669 (1983). The alleged conduct at issue is clearly covered by the CSRA, and does not touch on interests deeply rooted in local feeling or responsibility. *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959), *Sears Roebuck and Co.* v. *Carpenters* 436 U.S. 180 (1978). The subject matter of the instant complaint is identical to the claims which were actually presented by Mr. Warren to the FLRA, whose exclusive function is to carry out the purposes of Title VII of the CSRA. The risk of interference with the FLRA's jurisdiction is obvious and substantial. The FLRA's unequivocal unfair labor practice jurisdiction, interpreting an explicit duty of fair representation statute, dictates preemption, even assuming any general basis for invoking the federal court's jurisdiction, which there is none.

As provided herein, the carving out of an exception to the preemption doctrine in the private sector in *Vaca* v. *Sipes, supra* was based in large part on considerations not applicable to the federal statute, because of the rationed absence of a section 301 analogue. As the circuit courts considering this issue have uniformly concluded, the conscious deletion by Congress of a Section 301 analogue in the CSRA, the capable resolution of all matters exclusively in the FLRA, the special requirements of government, and

the explicit narrowly created judicial scheme, dictate a different result.

## II. There is No Pertinent or Valid Consideration Dictating Review of this Question on Certiorari

The sole reason formulated by Petitioner for granting the petition in Part II of his argument is that a decision by this court is necessary to settle an important question of law affecting federal employees, on which federal courts have issued conflicting opinions.

Quite unlike the status of the law on this issue as portrayed by Petitioner, there is absolute consistency among the federal circuits and lower courts that have considered this matter, and one lone dissenting assertion of jurisdiction by a Northern District of California District Court in *Karaholios* v. *Defense Language Institute*, 543 F. Supp.1201 (N.D. Cal. 1982).

The federal circuit court below and the Third Circuit in *Wilson* v. *United States*, Appeal No. 84-5735, slip op. (3rd Cir. 1985) however have held that federal courts have no subject matter jurisdiction over duty of fair representation cases brought by federal employees against their exclusive representatives. Similarly in *Butler* v. *AFGE*, Civil Action No. C-81-482, slip op. (N. D. Ohio. 1982) the court granted the exclusive representative's motion to dismiss the duty of fair representation complaint for lack of subject matter jurisdiction. *Accord: Holly* v. *Local 1534*, AFGE, Civ. Action No. SC 4536-82 (D.C. Super. Ct. 1983).

Supreme Court Rule No. 17 provides clearly that a review on a writ of certiorari is discretionary and will be granted only when there are special and important reasons therefor. A recitation in Rule 17 of the general character of reasons that will be considered in ruling on a petition for certiorari nowhere suggests that it would be appropriate to consider a petition for

certiorari where there is absolute consistency among the federal circuits that have ruled on the issue and a singular contrary ruling by a federal district court in a different circuit. With respect to conflicts in the federal courts, Rule 17 provides that a consideration of a case could be made if there is conflict among the federal circuits, although even a conflict among circuits does not mean an automatic grant of certiorari.

A conflict between a decision of a district court and that of a court of appeals is not, absent extraordinary circumstances, a sufficient ground to grant the writ. 13 Moore's, *Federal Practice*, ¶¶ 817.21 (2nd ed. 1985). As Professor Moore further recognizes in citing Harlan, *Manning the Dikes*, 13 Record NYCBA 541,552 (1958).

> Generally speaking, nothing short of a difference of decisions between two Courts of Appeals or between a Court of Appeals and the Court of Claims, whose judgments are reviewable directly by the Supreme Court will suffice to satisfy the conflict rule...A conflict of decisions between two district courts is not a ground for certiorari since resolution of such a conflict is a matter resting with the Courts of Appeals. Nor except in very rare instances will a conflict between a decision of the Court of Appeals and that of a district court in some other circuit suffice. 13 Moore's *Federal Practice*, ¶¶ 817.21 (2d ed. 1985).

Indeed, the Circuit Court below specifically addressed and repudiated the reasoning of the Northern District of California court in *Karaholios, supra* based on its patent reliance on two faulty premises: first, the alleged lack of an explicit duty of fair representation provision in the CSRA, and second, the inability of the FLRA to provide individual relief to employees aggrieved by a breach of the duty of fair representation. The Circuit Court, as provided *infra*,

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recognized that unlike the NLRA or the Railway Labor Act, the CSRA provides for an explicit duty of fair representation and that the FLRA is empowered and has diligently sought relief to federal employees aggrieved by a breach of the duty of fair representation.

Petitioner's suggestion of an uncertainty in the law somehow perplexing civilian federal employees is simply absurd, in light of the unanimity in the circuits, and the full redress available through the FLRA. Nor is there any basis whatsoever for Petitioner's suggestion that the "FLRA administrative processes are also subject to confusion."

The case presented involves no Consitutional issues nor conflict among circuits as to an important federal question. Therefore there is no basis for granting this petition for certiorari.

## CONCLUSION:

The Court of Appeals correctly determined that Congress conferred exclusive jurisdiction over a federal employee's duty of fair representation claim in the FLRA. The unanimity of this position by the Circuit Courts considering this issue, militates against granting this Petition for Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 8 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-579

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1985

WALTER WARREN,

*Petitioner,*

*v.*

LOCAL 1759, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES,

*Respondent.*

**On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Eleventh Circuit**

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 22.5 of the Rules of this Court, the Petitioner files this short Reply Brief in support of his Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

In its effort to persuade this Court to deny the Petition, Respondent has failed to address the crux of this case, to wit: whether the jurisdictional grant of 28 U.S.C. § 1331 can be invoked by a civilian federal employee who desires redress from a union's violation of its duty of fair representation.

## CONGRESS HAS MANIFESTED NO INTENTION, EITHER EXPRESS OR IMPLIED, TO DEPRIVE FEDERAL COURTS OF JURISDICTION OVER A FEDERAL EMPLOYEE'S DUTY OF FAIR REPRESENTATION CLAIM.

Respondent argues at length that the "statutory scheme" of Title VII of the Civil Service Reform Act (CSRA) shows a congressional intent to vest employees' duty of fair representation claims solely with the Federal Labor Relations Authority (FLRA). However, precious little in the way of *affirmative* congressional intent is cited by Respondent to support its theory. Thus, through its silence, Respondent apparently admits that Congress did not *expressly* act to divest the federal courts of jurisdiction over federal employees' duty of fair representation claims when it enacted Title VII of the CSRA.

Respondent's main contention appears to be that because Title VII of the CSRA provides for judicial intervention in only a few specified circumstances, Congress therefore meant to proscribe federal court jurisdiction in every other instance, including duty of fair representation claims. Respondent's analysis, however, ignores the history and development of the judicially enforced duty of fair representation.

Under both the National Labor Relations Act (NLRA) and the Railway Labor Act (RLA), federal courts have only limited jurisdiction over the administrative schemes created by Congress. *See, e.g., Leedom v. Kyne*, 358 U.S. 184 (1958). However, this congressional limit on the federal courts under the NLRA and RLA did not deter

this Court from holding that 28 U.S.C. § 1337 provided the federal courts with ultimate supervisory authority over unions, which had been given broad powers of exclusive representation.* *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944); *see also Steele v. Louisville and Nashville Railroad Co.*, 323 U.S. 192 (1944). When Congress enacted the CSRA, it was well aware of this Court's precedents creating and enforcing the duty of fair representation. Had Congress wanted to enshrine the FLRA as the sole and exclusive tribunal for adjudicating federal employees' duty of fair representation claims, it would have said *something* to that effect.

Further basing its arguments on negative implications derived from congressional silence, Respondent contends that Congress' failure to enact an analog to 29 U.S.C. § 185 (§ 301) in the CSRA shows that Congress meant to deprive federal courts of jurisdiction over civilian federal employees' duty of fair representation violations. However, "it is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 241 (1970).

Plainly and simply, Congress' failure to enact an analog to § 301 in the CSRA is irrelevant to the instant case. It is quite clear that unless otherwise stated by Congress, 28 U.S.C. § 1331, the general federal question jurisdiction statute, provides the federal courts with a

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* It must be remembered that all suits within the jurisdiction of 28 U.S.C. § 1337 can also be brought under § 1331 of the Judicial Code. Wright & Miller, Federal Practice and Procedure, § 3574 (1975). Section 1337 is merely the more specific of the two jurisdictional grants.

basis to adjudicate Petitioner's claims. *See* Boyce and Turner, *Fair Representation, the NLRB, and the Courts*, University of Pennsylvania Industrial Research Unit, (1984). As Congress has given no affirmative indication that it wished to deprive the courts of jurisdiction over the instant fair representation claim, 28 U.S.C. § 1331 provides the appropriate basis for jurisdiction.

## CONCLUSION

The so-called "differences" between the CSRA and its private sector counterparts, the RLA and the NLRA, provide no basis for the lower court's holding that civilian federal employees may not invoke the federal courts' jurisdiction to redress a duty of fair representation violation. The Court should grant this Petition for a Writ of Certiorari to examine an issue which affects many thousands of federal employees, and over which lower federal courts have issued conflicting opinions.

Respectfully submitted,

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